IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.236/2000

Reserved on.18.9.2007

Decided on.11.10.2007

Narinder Gaikwad. **…Petitioner.**

Versus

Union of India and others. **…Respondents**

Coram

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting ?[1]*.No.*

For the petitioner : Mr. H. S. Giani, Advocate.

For the respondents Mr. Sandeep Sharma, Asstt. Solicitor General of India.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that the petitioner was enrolled in Bombay Engineering Group Kirkee on 30th May, 1983. He was promoted to the post of Lance Niak on 26.1.1987 and was subsequently promoted to the post of Niak on 6.7.1988. The post of Niak is in feeder category for promotion to the post of Naib Subedar. The promotion from Naik to Havaldar was regulated as per notifications dated 18th December, 1985, 18th January, 1993 and 10th October, 1997. It is primarily contended by the petitioner that the process for filling the post of Havaldar was initiated by four Commands i.e. Southern Command, Western Command, Northern Command and Central Command but the same was not initiated by the Eastern Command which resulted in delay in considering the case of the petitioner for promotion from the post of Naik to the post of Havaldar. The petitioner was

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? No.

promoted to the post of Havaldar with effect from 19th September, 1994. He filed a statutory complaint and on that basis the seniority of the petitioner was fixed in the rank of Havaldar with effect from 22nd November, 1992 without effect of pay and allowances. He made a second statutory complaint on 9th July, 1997, which was disposed of by the Army Headquarters on the basis of which the case of the petitioner was considered for promotion to the post of Naib Subedar and he was promoted to the rank of Naib Subedar on 3.9.1998 with ante date seniority w.e.f. 3.3.1994. The petitioner has further been promoted to the post of Subedar vide order dated 31st August, 2000.

Mr. H.S Gyani, Advocate appearing on behalf of the petitioner had strenuously argued that the petitioner is entitled to pay and allowance of the post of Havaldar with effect from 22nd November, 1992 and is also entitled to pay and allowance of the post of Naib Subedar with effect from 3rd March, 1994 onwards. He also contended that his case for promotion to the post of Naib Subedar as well as for the post of Subedar should have been taken into consideration effectively with effect from 22nd November, 1992 and 3rd March, 1994 instead of 19th September, 1994 and 3rd September, 1998. He also contended that his client should rank senior to one Sh. Pushkar Singh Kharayat.

Mr. Sandeep Sharma, Assistant Solicitor General of India had strenuously argued that the petitioner could not be granted pay and allowances since the petitioner was physically promoted as Havaldar and Naib Subedar with effect from 19.9.1994 and 3.9.1998 with seniority alone. As far as the seniority is concerned, Mr. Sandeep Sharma submitted that the petitioner as per Annexure R-1 ranks senior to Pushkar Singh Khariyat who is at Sr. No.2 and petitioner is at Sr. No.1 in the seniority list of Naib Subedar.

I have heard the learned counsel for the parties and perused the record.

The petitioner was eligible for promotion to the post of Havaldar in the year 1992. It has come in the reply filed by respondents No.1 and 2 that the petitioner could not be promoted due to delay in conduct of promotion cadre which was pre-requisite for promotion as per Army Order 45/80 on the part of his the then parent unit i.e. Garrison Engineer, Sevoke Road. The process for filling up the post of Havaldar had already been initiated by four commands i.e. Southern Command, Western Command, Northern Command and Central Command and it was in the Eastern Command only that the process could not be initiated which resulted in supersession of the petitioner and his juniors were promoted from other commands to the post of Havaldar. The petitioner cannot be faulted for delay in initiating the process for filling up the posts in Eastern Command. He was promoted on 19.9.1994 to the post of Havaldar. It was only on the basis of the complaint filed by him that his seniority has been restored from 23.11.1992 but without pay and other allowances. It is thus evident that the authorities knew that the petitioner was due for promotion with effect from 22nd November, 1992 instead of 19th September, 1994. Since the petitioner had been wrongly deprived of his promotion with effect from 22nd November, 1992, he was entitled to pay and allowance for the post of Havaldar. He has been promoted to the post of Naib Subedar with effect from 3rd September, 1998 though his seniority on the basis of statutory complaint filed by him has been restored with effect from 3rd March, 1994, but without pay and allowances. It is abundantly clear that the authorities knew that the petitioner was bound to be promoted with effect from 3rd March, 1994 as Naib Subedar instead of 3rd September, 1998. The petitioner has been prevented from discharging

the duties of Naib Subedar with effect from 3rd March, 1994 and accordingly he is entitled to pay and allowances with effect 3rd March, 1994 for the post of Naib Subedar. The criteria for promotion for: JCOs and NCOs has been notified on 10th October, 1997 which has been enforced with effect from 1st January, 1998. It is evident from the contents of criteria of promotion notified on 10th October, 1997 that for the promotion to the rank of Subedar last three reports were to be considered out of which at least two are required to be in the rank of Naib Subedar and one could be in the rank of Havaldar in case of shortfall. The petitioner was to be considered for promotion from the rank of Naib Subedar to Subedar with effect from 3rd March, 1994. Since the petitioner has been prevented from discharging the duties of Naib Subedar with effect from 3rd March, 1994, the ACRs of the lower post were to be considered for promoting the petitioner to the post of Subedar or this condition was required to be waived of as has been done earlier in case of the petitioner while promoting him from the post of Havaldar to Naib Subedar as per communication dated 12th August, 1997. Accordingly the petitioner was to be considered for promotion as Subedar with effect from 1999 on the basis of criteria notified on 10th October, 1997. The respondents could not take advantage of their own wrongs of not considering the petitioner initially as Havaldar with effect from 22.11.1992 and thereafter as Naib Subedar on 3rd March, 1994, which has resulted in delayed promotion of the petitioner to the post of Subedar with effect from May, 1999. The respondents No.1 and 2 have averred in the reply that “the onus of not doing the promotion cadre despite issuing instructions to all concerned units by Records BEG Roorkee solely lay with the unit, Garrison Engineer Sevoke Road where the petitioner was serving”.

The Hon'ble Supreme Court has held in ***Union of India and Others versus K.V. Jankiraman and Others, (1991) 4 SCC 109*** that the employee will be entitled to arrears of salary from due date if he has been prevented from discharging the duties of a higher post. Their Lordships of the Hon'ble Supreme Court have held as under:-

> **"It was further contended on their behalf that the normal rule is "no work no pay"**. **Hence a person cannot be allowed to draw the benefits of a post the duties of which he has not discharged. To allow him to do so is against the elementary rule that a person is to be paid only for the work he has done and not for the work he has not done. As against this, it was pointed out on behalf of the concerned employees, that on many occasions even frivolous proceedings are instituted at the instance of interested persons, sometimes with a specific object of denying the promotion due, and the employee concerned is made to suffer both mental agony and privations which are multiplied when he is also placed under suspension, When, therefore, at the end of such sufferings, he comes out with a clean bill, he has to be restored to all the benefits from which he was kept away unjustly. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases."**

The Hon'ble Supreme Court has held in ***State of Kerala and Others versus E.K,. Bhaskaran Pillai, (2007) 6 SCC 524*** that the principle of "no work no pay" cannot be accepted as a rule of thumb and full back wages in certain circumstances may be justified, particularly when promotion is wrongly denied. Their Lordships of the Hon'ble Supreme Court have held that where the administration has wrongly

denied dues to an employee in that case he should be given full benefits including monetary benefit subject to there being any change in law or some supervening factors. Their Lordships of the Hon'ble Supreme Court have held as under:-

> **"Learned counsel for the State has submitted that grant of retrospective benefit on promotional post cannot be given to the incumbent when he has not worked on the said post. Therefore, he is not entitled to any benefit on the promotional post from 15-6-1972. In support thereof, the learned counsel invited our attention to the decisions of this Court in *Paluru Ramkrishnaiah v. Union of India, Virender Kumar v. Avinash Chandra Chadha, State of Haryana v. O.P. Gupta, A.K. Soumini v. State Bank of Travancore* and *Union of India v. Tarsem Lal.* As against this, the learned counsel for the respondent has invited our attention to the decisions given by this Court in *Unionof India v. K.V. Jankiraman, State of A.P. v. D.V.L. Narasimha Rao, Vasant Rao Raman v. Union of India* and *State of U.P. v. Vinod Kumar Srivastava.* We have considered the decisions cited on behalf of both the sides. So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before court or tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there**

being any change in law or some other supervening factors. However, it is very difficult to set down any hart-and-fast rule. The principle "no work no pay" cannot be accepted as a rule of thumb. There are exceptions where courts have granted monetary benefits also."

It has come in the reply that the petitioner earned first report on 1st January, 1999 and second on 1st June, 2000 and after earning two reports, he became eligible for consideration for further promotion. The petitioner was promoted with effect from 31st October, 2000. Though the petitioner has now been promoted with effect from 31st October, 2000, but he was required to be promoted with effect from 20th May, 1999 the date on which the persons junior to him were promoted to the post of Subedar. The promotion of the petitioner had been delayed due to the arbitrary decision of the respondents by not initiating the process of filling up the post by way of promotion expeditiously. The petitioner had been discriminated against on two occasions firstly when he was bound for promotion with effect from 22nd November, 1992 as Havaldar and thereafter on 3rd March, 1994 when he was to be promoted to the post of Naib Subedar. It is in these circumstances that the petitioner will now be deemed to have been promoted after fulfilling the criteria laid down for promotion from 22.11.1992 as Havaldar, 3rd March, 1994 as Naib Subedar and 20th May, 1999 as Subedar with all consequential benefits.

The upshot of the above discussion is that:

i) **the petitioner will be deemed to be regularly promoted to the post of Havaldar with effect from 22.11.1992 with all consequential benefits i.e. pay, allowances, seniority etc;**
ii) **the petitioner will be deemed to have been promoted on regular basis as Naib Subedar with effect from 3rd March, 1994 with all consequential benefits i.e. pay, allowances, seniority etc;**

iii) **the petitioner should have been considered for promotion to the post of Subedar with effect from 20th May, 1999, the date from which the juniors of the petitioner were promoted;**

iv) **the seniority of the petitioner has already been restored as Naib Subedar above Pushkar Singh Karayat as is evident from Annexure R-2.**

Accordingly the writ petition is allowed. The respondents are directed to pay the petitioner pay and allowances of the post of Havaldar with effect from 22nd November, 1992 to 3.3.1994 and thereafter to pay him the pay and allowances of the post of Naib Subedar with effect from 3rd March, 1994 till 20th May, 1999. The petitioner will be deemed to have been promoted to the post of Subedar with effect from 20th May, 1999 with all consequential benefits. The respondents are directed to work out the arrears of salary to the post of Havaldar, Naib Subedar and Subedar within a period of six weeks from today. There shall be no order as to costs.

(Rajiv Sharma), Judge

October 11, 2007
Awasthi